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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ERIC J. LIVELY,

Defendant and Appellant.

A154039

(Humboldt County
Super. Ct. No. 1701997)

I. INTRODUCTION

Eric Lively (appellant) and Jesse Simpson were both residents of Shelter Cove in Humboldt County. Appellant lived on Debbie Lane. Jesse Simpson lived down the block just past Eileen Road, and Jesse's brother Thomas lived on property directly behind appellant's home. On the afternoon of May 3, 2017, appellant drove his 2008 Tacoma Truck through the intersection of Debbie Lane and Eileen Road, striking and killing Jesse Simpson. Appellant, who has a history of disputes with the Simpson brothers, was charged with murder. (Pen. Code § 187.)¹ At trial, he presented an accident defense, claiming that the collision occurred because Simpson walked out in front of his moving truck while trying to attack him with a weed whacker. A jury convicted appellant of second degree murder, and the trial court imposed a sentence of 15 years to life in prison.

In this court, appellant contends the judgment must be reversed because (1) his conviction is not supported by substantial evidence; (2) the trial court failed to instruct

¹ Statutory references are to the Penal Code unless we indicate otherwise.

the jury to resolve any reasonable doubt about the nature of his crime in favor of a lesser offense verdict; and (3) a series of trial errors individually or cumulatively deprived him of a fair trial. Appellant also contends that this case must be remanded for a hearing on his ability to pay fines and fees imposed during his sentencing hearing. We affirm the judgment and conclude that a remand is not required.

II. FACTUAL BACKGROUND

A. The Prosecution Evidence

1. Appellant's Problems with Jesse Simpson

During the months prior to Jesse Simpson's death, appellant was living with his girlfriend Crystal Worthy and their seven year old son. Appellant's three older children from a prior relationship also lived in his home. At trial, Worthy and appellant's 17-year old daughter E. both testified that appellant had become convinced that Jesse Simpson was stealing from him.

Worthy also testified that appellant threatened to kill Simpson. The first time was in December 2016, when appellant told Worthy that Jesse "or someone" had robbed their house. He got a knife and a baseball bat and "roamed" around the neighborhood in his truck. He told Worthy that if he returned with " 'blood on [his] hands' " that she better have his " 'back.' " He also said, " '[s]omebody is going to die for this shit.' " A few months later, in early April 2017, appellant was standing on his deck and yelled over toward Thomas Simpson's property, " 'I'm going to kill you tweakers. Jesse, I want to kill you.' "

Worthy moved out of appellant's home in April 2017 because he kept making false accusations against her, claiming that she was colluding with the Simpsons to steal appellant's property, that she was using methamphetamine with them, and that she was having affairs with them. After Worthy moved out, appellant began making accusations and veiled threats in text messages, accusing her of being a prostitute, wishing her dead, and saying things like " 'Please quit robbing our house with your twaker network.' " Worthy testified that appellant's accusations against her were untrue. She is a recovered drug addict, and has been sober since 2013, aside from a brief relapse in 2016. She

denied ever taking drugs with the Simpsons or having personal knowledge about their drug use.

David Reddy was appellant's next door neighbor and was also acquainted with the Simpsons. Reddy testified that he never heard appellant threaten Jesse, but he recalled two prior conflicts between the men. The first occurred a few years before Jesse was killed, when appellant and Jesse had a fistfight in the street where they threw "blows at each other." The second incident occurred one afternoon in April 2017. Reddy saw appellant walking down their street carrying a baseball bat, which he was slapping in his hand. Reddy, who was out on his deck, asked where the game was. Appellant replied, " 'I'm going down to Jessie's house. I'm going to straighten him up.' " Five minutes later, appellant walked back up the road carrying the bat.

In April and May 2017, appellant was working on a construction crew that was doing a remodeling project in Ettersburg. Appellant told his co-workers about problems he was having with his neighbors, including an individual named Jesse. He complained that these neighbors were stealing from him and terrorizing his family. He also said his ex-girlfriend had cheated on him with a neighbor, and that he wanted to kill his neighbors.

2. Appellant's Activities on the Day Jesse Simpson was Killed

On the morning of May 3, 2017, appellant arrived at his job site at around 9:00. He was distraught and agitated, explaining that somebody had broken into his home. He asked if anybody cared if he worked that day. When the foreman asked if appellant had something better to do, he replied " 'Like go kill my fucking neighbor.' " Appellant borrowed a cell phone so he could report the theft, but then said he had to drive to Garberville to file a report. When he returned, he complained to co-workers that his neighbors were " 'getting away' " with their theft because the police were on their side. He said he wanted to go home and retrieve some valuables and asked the contractor on the project, Max Mahoney, to come with him because he was afraid to go alone. Mahoney agreed and drove them in his truck.

Mahoney testified that he went inside appellant's house for a few minutes but felt uncomfortable. So, he waited outside while appellant loaded items into the truck, including a guitar case, two small suit cases, a compound bow and a large "contractor" garbage bag. Mahoney suspected that there was marijuana in the bag, but he did not ask questions. Driving back, Mahoney was concerned about having contraband in his truck, but he was more concerned by appellant's behavior because he was acting dangerous and crazy. When they arrived back at the job site that afternoon, Mahoney was anxious to get back to work. However, appellant did not do any construction work that day. He said that his ex-girlfriend or neighbors disabled his compound bow when they broke into his house. So, he reassembled the bow and then did some target practice against a tree, before loading it into his truck.²

At 1:20 p.m., appellant called the Humboldt County Sheriff's office, and told the dispatcher that his "house was definitely robbed today." During the call, which was recorded, appellant said he was missing \$3,000 and other property. He said there was no sign of forced entry and he had recently changed the locks, so he suspected somebody came into his home while he was sleeping and got the "number to the keyset and then went and matched numbers to keys." When asked who could have done that, appellant identified his former girlfriend, Crystal, and a neighbor named Thomas who he suspected was having an affair with Crystal. Appellant also suggested that Thomas's brother Jesse was involved, telling the dispatcher that Jesse was "out there right now mowing the lawn." Appellant explained that he had problems with these neighbors because after he reported Jesse for selling methamphetamine they treated him like a snitch.

At around 2:30, appellant left work for the day, telling his co-workers that if something was to happen to him, they should sell his belongings and give the money to his children. Appellant arrived home at around 3:30. His daughter E. was upstairs doing

² Mahoney testified that he told appellant he could store his things in a tool shed at the job site, but he just left them in Mahoney's truck. At the end of his work day, Mahoney opened one of the cases and saw that it contained marijuana. He and another worker moved the items into the shed.

chores in the kitchen. E. had gotten a ride home from school and arrived at the house about 15 minutes before appellant. The family's 2008 Tacoma was in the driveway, which was the car she typically used because her father had recently purchased a new Tacoma truck. E. was aware that the old truck was low on gas, but she thought it had enough to get her to work later that day. When appellant arrived home, he came upstairs, unlocked the door to his bedroom and went inside for a few minutes. Then he came out and told E. that Jesse had robbed him. E. tried to assure him this was not true, but appellant was "[a]ngry" and "[d]etermined" and insisted that he had. Then he left in the old Tacoma that E. had intended to take to work.

At around 4:00 or 4:30 p.m., Eric Snyder was at his home in Shelter Cove, which was approximately 240 feet away from the intersection of Debbie Lane and Eileen Road. Snyder was in his driveway when he heard a "loud noise . . . like two cars crashing." He went to his deck, where he saw a silver pickup truck that looked like it had crashed. He walked to the intersection, where appellant was picking up "objects" and putting them in the back of the truck. When appellant saw Snyder approaching, he yelled out " 'Oh, my gosh . . . I hit Jesse . . . Jesse jumped out in the road . . . I hit him.' " Jesse Simpson was lying on his back in the street. His shirt was open, his pants were down at his feet, he was bleeding from his nose and eye, and he was unconscious. A weed whacker was slung around his neck. Appellant told Snyder that he had moved Jesse to the side of the road, but he also said that Jesse had walked. He wanted to put Jesse in the truck and take him to the hospital, but Snyder said no, they needed to call the fire department. Snyder ran back to his house to call 9-1-1 and from his deck he saw appellant drive away.

Appellant drove to his house. E. was outside taking care of her kittens. The front of the truck was smashed and there was blood on the truck. Appellant also had blood on his hands and a substance all over his shirt that appeared to be blood. He was "extremely flustered" as he "ushered" E. inside the house. He told her not to call the police and unplugged the cord to the house phone. At some point, he also said " 'I've got to go help Jesse. He's still alive.' " He went in his bedroom, and when he came out, he was shirtless and no longer had blood on his hands. He gave E. a black zippered bag that

contained about \$3,000, jewelry and other items, and the keys to the new Tacoma, telling her to go to Crystal Worthy's house. Then he left. David Reddy was driving home when he saw appellant come out of his house with a container of water. Reddy stopped and asked what was going on. Appellant, who was "disturbed and frantic," replied, " 'I just ran over Jessie. He was right in front of me. I've got to wash the blood off.' "

Meanwhile, Snyder called 9-1-1 and then went back to the intersection of Debbie and Eileen, where he noticed appellant arriving at approximately the same time. Other neighbors also came to the scene. Snyder covered Jesse with a blanket. Appellant was "really upset." He appeared nervous and was yelling remarks. He said he was sorry he had hit Jesse and he wanted to give him a drink of water. He mentioned something about having a new truck and not being used to the brakes. Medical personnel and law enforcement soon arrived. Jesse died on the way to the hospital.

California Highway Patrol Officer Juan Lopez arrived at the scene at 5:06 p.m. and questioned appellant about the incident. Appellant reported that he left work at 4:30 that day, stopped at the store and was driving around the block before heading home. Before he reached the intersection of Debbie and Eileen, he saw Jesse Simpson cutting grass on the corner and stopped his truck. He made eye contact with Jesse, and then "hit the gas and peeled out." Appellant told Lopez that he accelerated and steered right, and he did not hit the brake until after the collision. Appellant admitted that he hit Simpson but claimed that it was an accident, that Simpson jumped out in front of his truck. After the collision, appellant helped Simpson stand up and then Simpson told him he wanted to go home and started walking to the corner. Appellant admitted to Officer Lopez that he and Jesse had been having problems and other individuals at the scene confirmed that fact. Highway Patrol Officer Michael Cole was also at the scene. Appellant told Cole that he didn't mean to hit Jesse, but he jumped in front of his truck, and that after the accident Jesse had been walking around. Appellant also said, "[w]hen I hit Jesse, I didn't know that I would be charged."

3. The Autopsy

Jesse Simpson's autopsy was performed by Dr. Mark Super, the forensic pathologist for the Merced County Sheriff's office. Super concluded that Simpson's cause of death was "[m]ultiple blunt impact injuries due to being a pedestrian struck by a motor vehicle." Simpson's injuries included a skull fracture, with bruising and bleeding of the brain; a pelvic fracture; a fractured left clavicle and several broken ribs; and a fractured tibia and fibula in his left leg. Super testified that if Simpson had only suffered the leg injuries, it was conceivable that he could have got up, although it would have been painful. However, his head injuries were "incompatible with life." When his head hit the ground, he would have been "[i]mmediately unconscious," and would not have been able to get up.

4. Uncharged Conduct

Trampus Danhauer is a former resident of Shelter Cove, where he met and became friends with appellant. One morning in November 2013, Danhauer heard someone yelling his name from the road. He went outside and found appellant who had parked his silver Toyota partially in Danhauer's driveway. Appellant was screaming threats and accusations at Danhauer, saying "I caught you on camera. I know what you guys done. I'm going to come back over here, kill you guys." Danhauer became angry, yelled back that he wanted to fight, and told appellant to get out of the truck. But appellant just kept moving the truck back and forth. More threats were exchanged and Danhauer moved closer, so that he was standing in his landlord's unpaved driveway. Appellant started to drive away but then "whipped" his truck around and "floored it" directly toward Danhauer. Appellant accelerated his speed and did not brake as he drove by, making contact with Danhauer's body. To avoid being run over, Danhauer pushed off from the hood of the truck and then fell to the ground. He picked up a bamboo stick and, when appellant drove by a second time, Danhauer chased after him. Then Danhauer's girlfriend called 9-1-1.

An investigation was conducted by Humboldt County Deputy Sheriff David Diemer and Sergeant Kenneth Swithenbank. Appellant told the officers that he sold

Danhauer marijuana for \$2,500 and was still owed \$1,200. He went to Danhauer's house to collect the debt, but when Danhauer picked up a stick and swung it at him, appellant backed out of the driveway and left. Appellant was arrested for assault and while he was being transported to the police station he "accus[ed] Sergeant Swithenbank of colluding with known methamphetamine dealers." Ultimately, the district attorney did not charge appellant with the assault.

B. The Defense Case

Appellant testified in his own defense. He acknowledged that he was upset about the endless "commotion" and drug activity in his neighborhood and he testified that Jesse Simpson was a part of that problem, but he denied singling Jesse out as an enemy. Appellant also denied that he intended to kill or strike Simpson when he drove through the intersection on May 3, 2017. Appellant's account of that day, which was significantly different than the account provided by the prosecution witnesses, is summarized below.

On the morning of May 3, appellant was driving across a narrow bridge on his way to work when Thomas Simpson pulled out in front of him in a pickup truck and blocked his path. Appellant backed up and Simpson passed, but the incident was "really intimidating" and left him "shaken or uncertain." When he got to work, he borrowed a cellphone to call the police, but he ended up having to drive to Garberville to make the report. When he returned to his job site, he and his co-workers discussed their plan to sell appellant's marijuana. Appellant had a substantial amount of marijuana at his house, which was worth \$35,000 to \$40,000, and his co-worker Jordan knew a buyer. But appellant had not been comfortable driving the product to work, so Mahoney agreed to drive appellant to his house to pick it up.

When appellant and Mahoney got to appellant's house, appellant left Mahoney downstairs to sort through several "turkey bags" of "shake" that were stored in a closet. Appellant went up to his bedroom to get some cases to carry the "pounds." He always locked his bedroom door with a deadbolt, but that day he found it open. \$3,000 was missing from his safe, and his compound bow had been moved to the bed. Appellant

concluded that he had been robbed and suspected that Crystal Worthy and Thomas and Jesse Simpson “probably had something to do with it.” While he was on the phone reporting the theft, he saw Jesse mowing his brother’s lawn, which he mentioned to the dispatcher. Then he and Mahoney loaded the marijuana into Mahoney’s truck. Appellant also loaded some gas cans, so he could buy gas for E.’s truck. Then they returned to the job site.

After work, appellant stopped at the general store on the way home to fill the gas cans. When he got home, he greeted his dog Grizzly but he did not see E. He went to upstairs to get some jugs, so he could mix the gas with “two-cycle oil.” Then he went and put gas in the old truck. He heard Grizzly barking near the home of a neighbor who had complained in the past, so he called for E. to get the dog. When E. did not come, appellant got in the truck to go retrieve the dog. He found Grizzly on the corner of Ridge and Eileen. Then he drove down Eileen toward the intersection with Debbie Lane.

Before reaching the intersection, appellant saw Jesse “weed whacking . . . over by the stop sign.” He and Jesse made eye contact, Jesse started walking toward the middle of Eileen Road, and then appellant stopped his truck. The weed whacker strapped to Jesse’s chest was running. Because they had “issues in the past,” appellant was afraid Jesse might try to block him from turning left toward his home. So appellant decided to try to “get out of there” by steering right and accelerating through the intersection. But as he passed, Jesse swung the weed whacker and hit the windshield of the truck. Appellant flinched and ducked, “took a moment to recover,” and then “hit the brake,” but there was a “good impact.” When appellant got out of the truck, Jesse was on the ground bleeding. Appellant was “panic stricken and horrified.” He was attempting to put Jesse in his truck to take him to the fire station when Eric Snyder arrived. After they moved Jesse to the side of the road, Snyder went to call 9-1-1 and appellant drove to the fire station to get help. But when he saw the ambulance was already coming, he drove home. He gave E. the keys to his new truck, along with a billfold and other items and told her there had been an accident, that he had hit Jesse. Then he got water and a towel and headed back to the accident scene.

During his testimony, appellant disputed statements made by several trial witnesses. He denied telling co-workers that he had been robbed on the morning of May 3 or saying that he wanted to kill his neighbor. Appellant also denied telling E. that Jesse had robbed him on May 3, or telling her not to call the police after he hit Jesse with his truck. Appellant also testified that he did not unplug the phone before returning to the accident scene. Appellant denied David Reddy's testimony that a few weeks before the accident appellant walked down the street with a baseball bat looking for Jesse, and he testified that he did not tell Reddy that he had to wash away blood when he was heading back to the accident scene. Appellant testified that his problems with Crystal Worthy all related to her methamphetamine use. He disputed Worthy's testimony that he drove around with a baseball bat looking for his neighbors and denied that he threatened Jesse from his deck. Appellant also testified that Danhauer gave a false account of their encounter. According to appellant, Danhauer invited him to come by so Danhauer could pay for marijuana that he purchased from appellant. Appellant denied confronting Danhauer about anything, driving his truck at Danhauer, or threatening to kill him.³

The defense elicited testimony from three expert witnesses. An accident reconstruction expert testified that in his opinion a dirty abrasion mark on the driver's side windshield of appellant's 2008 Tacoma was caused by a weed whacker. A forensic toxicologist who tested a sample of Jesse Simpson's blood offered the opinion that Simpson had consumed a potentially toxic amount of methamphetamine. Finally, a forensic psychologist specializing in substance abuse testified about the side-effects of methamphetamine use, which include "a feeling of invincibility," problems with impulsivity and inhibition, and a strong causal connection to violence.

III. DISCUSSION

A. Sufficiency of the Evidence

Appellant challenges the sufficiency of the trial evidence to support the jury's finding that he committed second degree murder.

³ Officer Swithenbank testified on rebuttal that during his investigation appellant admitted that "Danhauer may have bumped off his truck at some point."

“ ‘On appeal we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] The standard of review is the same in cases in which the People rely mainly on circumstantial evidence. [Citation.] “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citations.]’ [Citations.]’ The conviction shall stand ‘unless it appears “that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].” ’ ” (*People v. Cravens* (2012) 53 Cal.4th 500, 507–508).

Second degree murder “is ‘the unlawful killing of a human being with malice aforethought but without the additional elements, such as willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.’ [Citation.] Malice may be either express (as when a defendant manifests a deliberate intention to take away the life of a fellow creature) or implied. [Citation.] ‘Malice is implied when the killing is proximately caused by “ ‘an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.’ ” [Citation.] In short, implied malice requires a defendant’s awareness of engaging in conduct that endangers the life of another.’ ” (*People v. Cravens, supra*, 53 Cal.4th at p. 507.)

Here, appellant does not dispute that he killed Simpson by hitting him with the truck, but he contends there is no evidence he committed this act with express or implied malice. We disagree. The record summarized above contains substantial circumstantial evidence that appellant acted with express malice when he struck and killed Jesse

Simpson. The prosecution witnesses testified that appellant bore ill-will toward Simpson and threatened to kill him. The jury also received evidence that appellant had used his truck as a weapon against a pedestrian in a prior altercation, subsequently denied doing so, and then claimed that the victim in that prior incident had attempted to attack him. This evidence substantially supports the jury's finding that appellant acted with malice.

Appellant points out that he testified that the collision was an accident and that he did not intend to kill or even hit Jesse Simpson. Appellant acknowledges that the jury did not believe him, but he posits that if we disregard his testimony, there is an evidentiary void because he was the only person who "witnessed the incident." This reasoning rests on the erroneous assumption that there must be direct evidence of express malice, which is not the law. Moreover, the fact that the jury found that most of appellant's testimony was not credible does not require us to disregard his admission at trial that he saw Jesse walking toward him and came to a complete stop before he decided to speed through that intersection without applying his brakes. This substantial evidence of implied malice is an additional basis upon which to affirm appellant's conviction.

B. Jury Instructions

Appellant contends the trial court violated a sua sponte duty to give a jury instruction addressing the holding of *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*).

At a criminal trial, the court must instruct the jury regarding general principles of law governing the case even absent a request. (*People v. Michaels* (2002) 28 Cal.4th 486, 529–530; see *People v. Whalen* (2013) 56 Cal.4th 1, 68.) The instructions must be complete and a correct statement of the law, "but no particular form is required." (*People v. Fiu* (2008) 165 Cal.App.4th 360, 370.) Further, "[t]he court has no duty to give an instruction if it is repetitious of another instruction also given." (*People v. Barajas* (2004) 120 Cal.App.4th 787, 791.) " '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' " (*People v. Carrington* (2009) 47 Cal.4th 145, 192.)

1. The *Dewberry* Principle

In *Dewberry*, *supra*, 51 Cal.2d 548, the defendant was charged with murder and manslaughter for shooting and killing a man during a dispute in a bar. (*Id.* at pp. 550–553.) At trial, the court instructed the jury regarding the elements and degrees of murder and the elements of manslaughter, the presumption of innocence and the prosecutor’s burden of proving guilt beyond a reasonable doubt. The court also instructed the jury that (1) if they found the defendant committed murder, but had a reasonable doubt as to the degree, they “should give defendant the benefit of the doubt and find him guilty of second degree murder,” and (2) if they had a doubt about whether the killing was manslaughter or justifiable homicide, the “defendant was to be acquitted.” (*Id.* at p. 554.) However, the court denied a defense request to give an instruction that stated in pertinent part: “ ‘If you find that defendant was guilty of an offense included within the charge of the indictment, but entertain a reasonable doubt as to the degree of the crime of which he is guilty, it is your duty to convict him only of the lesser offense.’ ” (*Ibid.*)

The *Dewberry* jury returned a verdict of second degree murder and on appeal the defendant argued that the trial court’s rejection of his lesser offense jury instruction was prejudicial error. (*Dewberry*, *supra*, 51 Cal.2d at pp. 554–555.) The Supreme Court agreed. It reasoned that the instruction proposed by the defense was an accurate statement of the law and omitting it was misleading because “[t]he failure of the trial court to instruct on the effect of a reasonable doubt as between any of the included offenses, when it had instructed as to the effect of such doubt as between the two highest offenses, and as between the lowest offense and justifiable homicide, left the instructions with the clearly erroneous implication that the rule requiring a finding of guilt of the lesser offense applied only as between first and second degree murder.” (*Id.* at p. 557.) Moreover, the error was prejudicial because “[i]t went directly to the defense of reasonable doubt of defendant’s guilt of second degree murder; it was clearly responsive to an issue raised by the evidence [citations]; and it was essential to cure the misleading effect of its absence in light of the other instructions given.” (*Id.* at pp. 557–558.)

Notably, *Dewberry* did not address the scope of the trial court's sua sponte duty to instruct a jury regarding the applicability of the reasonable doubt standard to lesser offenses, but rather the denial of a proposed defense instruction, which was prejudicial because it misled the jury about how to apply the reasonable doubt doctrine in a case involving lesser offenses. (*Dewberry, supra*, 51 Cal.2d 548.) However, after *Dewberry* was decided, some appellate courts interpreted it as imposing a sua sponte duty on trial courts to instruct on the effect of a reasonable doubt as between lesser and greater offenses whenever that issue is raised by the trial evidence. (*People v. Crone* (1997) 54 Cal.App.4th 71, 76 (*Crone*) [citing cases].)

Subsequently, the Supreme Court clarified the *Dewberry* principle in *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262 (*Musselwhite*), an automatic appeal following the defendant's convictions for capital murder and attempted murder. The defendant claimed that his trial court committed *Dewberry* error because it did not give an instruction specifically telling the jury that if it had a reasonable doubt about whether the defendant attempted to murder his surviving victim, but it believed that he did assault her with a deadly weapon, it should find him guilty of the lesser assault offense. The *Musselwhite* court rejected this claim of error for two related reasons. First, *Dewberry* stands for the proposition that "a criminal defendant is entitled to the benefit of a jury's reasonable doubt with respect to all crimes with lesser degrees or related or included offenses. [Citation.]" (*Musselwhite*, at p. 1262.) Second, a jury is instructed adequately regarding this general principle if it receives "several generally applicable instructions governing its use of the reasonable doubt standard," which have the combined effect of instructing them to give the defendant the benefit of any reasonable doubt they may have as to any lesser included or related offenses or lesser degrees. (*Ibid.*)

2. Analysis

Appellant incorporates two premises into his claim of *Dewberry* error. First, he posits that *Dewberry* and its progeny impose a sua sponte duty on trial courts to give a jury instruction that specifically relates the reasonable doubt standard to the choice between greater and lesser offenses. Second, appellant argues that the trial court violated

its sua sponte duty in this case because it mistakenly believed that the *Dewberry* principle is accurately and adequately addressed in CALCRIM No. 640.

First, the *Dewberry* principle need not be addressed in a single jury instruction that explicitly connects the reasonable doubt standard to the choice between greater and lesser offenses. As discussed above, *Dewberry* is satisfied when the instructions as a whole advise the jury to give the defendant the benefit of any reasonable doubt they may have with respect to all crimes with lesser offenses. (*Musselwhite, supra*, 17 Cal.4th at p. 1262.; see also *People v. Friend* (2009) 47 Cal.4th 1, 54–56.) Second, we are not persuaded by appellant’s unsupported claim that “CALCRIM [No.] 640 is an attempt to comply with the requirements of *Dewberry*.” CALCRIM No. 640 addresses the general subject of jury deliberations and how to complete verdict forms in cases where the defendant is charged with first degree murder and the jury is given separate verdict forms for each level of homicide. Appellant’s contention that this isolated instruction does not satisfy *Dewberry* is a strawman argument.

Thus, to review appellant’s claim of jury instruction error, we consider the entire charge, rather than parts of an instruction or a particular instruction. As noted, this is the general standard of review when the jury instruction challenge pertains to a general principle of law. (*People v. Carrington, supra*, 47 Cal.4th at p. 192.)

In this case, the trial court’s preliminary instructions to the jury included CALCRIM No. 220, which addressed the core principles of the presumption of innocence and the People’s burden of proving guilt beyond a reasonable doubt. With this instruction, the court explicitly advised the jury that “Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt unless I specifically tell you otherwise.”

Then, the court gave several instructions reinforcing the principle that the reasonable doubt requirement applied no matter what type of evidence was presented against appellant. For example, CALCRIM No. 224 instructed that a fact could be established with circumstantial evidence only if that fact was established beyond a reasonable doubt, and that “[i]f you can draw two or more reasonable conclusions from

circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.” CALCRIM No. 359, addressing the requirement that a defendant may not be convicted based only on his own out-of-court statements, repeated the admonition that the appellant could not be convicted of any crime “unless the People have proved his guilt beyond a reasonable doubt.”

Before the jury was instructed on the substantive crimes of murder and manslaughter, the court used CALCRIM No. 510 to instruct them regarding appellant’s accident defense. This instruction concluded with an express admonition that “The People have the burden of proving beyond a reasonable doubt . . . that the killing was not excused. If the People have not met this burden, you must find the defendant not guilty of murder or manslaughter.”

The CALCRIM instructions used to instruct the jury regarding the substantive crime of murder and the lesser included offense of manslaughter individually and cumulatively reinforced the general principal that the reasonable doubt requirement applied to both charged crimes and lesser included offenses. CALCRIM No. 520, setting forth the elements of murder, instructed the jury that if it found the defendant committed murder, the crime was second degree murder unless the People proved beyond a reasonable doubt that the defendant committed first degree murder. CALCRIM No. 521, defining first degree murder, reiterated that the burden was on the People to prove “beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime.”

Similarly, CALCRIM No. 570, addressing the circumstances that reduce a killing that would otherwise be murder to voluntary manslaughter, placed the burden squarely on the People to prove beyond a reasonable doubt “that the defendant did not kill as a result of a sudden quarrel or in the heat of passion.” And CALCRIM No. 580, defining the crime of involuntary manslaughter, instructed that as applied in this context the reasonable doubt requirement meant that the burden was on the People to prove beyond a reasonable doubt that a circumstance that would reduce a killing from murder and/or manslaughter to involuntary manslaughter did not apply in this case.

When viewed as a whole, the combined CALCRIM instructions apprised the jury of the *Dewberry* principle without creating any misleading impression about the pervasive reach of the reasonable doubt standard. Thus, there was no instructional error.

C. Other Alleged Errors and Cumulative Prejudice

Appellant contends that five errors occurred during his trial which, when considered cumulatively, deprived him of his constitutional rights to due process and a fair trial. We address these issues in a different order than appellant presents them in his appellate briefs, beginning with evidence issues, of which there are three, and then turning to two procedural matters.

1. Evidence Issues

a. Uncharged Conduct Evidence

Appellant contends the trial court erred by denying his pretrial motion to exclude evidence of the Danhauer incident under Evidence Code section 352 (section 352).

Evidence Code section 1101 (section 1101) establishes the general rules governing the admissibility of evidence of a defendant's uncharged misconduct. Under this provision, "[e]vidence of defendant's commission of other crimes, civil wrongs or bad acts is not admissible to show bad character or predisposition to criminality, but may be admitted to prove some material fact at issue such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. [Citations.] Because evidence of a defendant's commission of other crimes, wrongs, or bad acts 'may be highly inflammatory, its admissibility should be scrutinized with great care.' " (*People v. Cage* (2015) 62 Cal.4th 256, 273 (*Cage*).) "Specifically, the uncharged act must be relevant to prove a fact at issue (Evid. Code, § 210), and its admission must not be unduly prejudicial, confusing, or time consuming (Evid. Code, § 352)." (*People v. Leon* (2015) 61 Cal.4th 569, 597–598 (*Leon*).)

In this case, the trial court denied appellant's in limine motion to exclude the Danhauer evidence, concluding that it was admissible under section 1101 to prove the intent element of murder and to rebut appellant's accident defense, and that its probative value outweighed other factors set forth in section 352. Before Danhauer testified, the

trial court denied a renewed motion to exclude this evidence, clarifying that it would give limiting instructions prior to Danhauer's testimony and at the end of trial, which it did. Thus, the jury was instructed regarding limitations on the use of this evidence, including specifically that it was not to be used to conclude that appellant has a bad character or is disposed to commit crime.

In this court, appellant's sole contention is that evidence of the Danhauer incident should have been excluded because its marginal relevance was outweighed by the danger of unfair prejudice. We review the trial court's ruling for an abuse of discretion. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 405.)

First, we disagree with appellant's premise that this evidence was only marginally relevant. The relevance of an uncharged act "depends, in part, on whether the act is sufficiently similar to the current charges to support a rational inference of intent, common design, identity, or other material fact. [Citation.]" (*Leon, supra*, 61 Cal.4th at p. 598.) The least degree of similarity is required for the evidence to be probative of intent and/or the absence of a mistake. (*People v. Burnett* (2003) 110 Cal.App.4th 868, 881.) In this case, the primary disputed issue at trial was whether appellant killed Jesse Simpson with malice aforethought as the People alleged or if the fatal collision was an accident as the defense alleged. The Danhauer incident was highly probative of this material issue because it involved a very similar incident when appellant was accused of attempting to run down a pedestrian with his truck.

Second, the trial court concluded reasonably that this evidence was not unduly prejudicial. " " "In applying section 352, 'prejudicial' is not synonymous with 'damaging.' " " [Citation.] " " "[A]ll evidence which tends to prove guilt is prejudicial or damaging to the defendant's case." " " [Citation.] The 'prejudice' that section 352 seeks to avoid is that which " " "uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." " " " (*Cage, supra*, 62 Cal.4th at p. 275, italics omitted.) Here, the Danhauer evidence that defendant claims was prejudicial was such only in the sense that it was probative, not because it tended to evoke an emotional bias unrelated to the issues at hand.

Appellant contends that this evidence was unfairly prejudicial because of its “equivocal nature” and the likelihood that it did not happen. But there was nothing equivocal about Danhauer’s testimony or the corroboration supplied by the investigating officers. Moreover, appellant did not move to exclude this evidence on the ground that it was untrue. Subsequently, he exercised his right to testify and denied that he committed the assault, but appellant articulates no reason for questioning the jury’s ability to resolve that credibility dispute. The jury was instructed not to consider this evidence at all unless they concluded that appellant did in fact commit this act and even then, if the jury decided to consider the evidence for the limited purposes for which it was admitted, this incident was only one factor to consider and insufficient by itself to satisfy the prosecutor’s burden of establishing guilt beyond a reasonable doubt.

Appellant contends it was unfair to tell the jury about an incident for which he was arrested but never charged. The fact that a defendant has an arrest history may often be irrelevant and therefore unduly prejudicial. (See e.g. *People v. Williams* (2009) 170 Cal.App.4th 587, 609.) However, the Danhauer incident was not admitted in order to show that appellant was arrested in the past; it was admitted because the underlying incident was highly probative of the disputed issues of intent and absence of mistake.

Finally, appellant complains that informing the jury about a crime for which he was not convicted may have encouraged them to punish him for the uncharged conduct whether or not he committed the charged offense. (See *People v. Tran* (2011) 51 Cal.4th 1040, 1047.) However, the danger that a jury will punish a defendant for uncharged conduct is greatly diminished when, as here, that conduct is not more serious or inflammatory than the charged crime. (*Ibid.*)

b. Appellant’s Text Messages

Appellant contends the trial court erred by overruling his objection to evidence that he sent offensive text messages to Crystal Worthy after she moved out of his home, accusing her of stealing from him with her “tweaker” friends, engaging in prostitution, and taking illegal drugs, and wishing her dead.

When the prosecutor called Worthy to testify, the defense objected to using her to introduce allegedly irrelevant e-mails and text messages. Following an Evidence Code section 402 hearing, the court ruled that the prosecution could admit a small excerpt of text messages, approximately one page in length. The court ruled that evidence of appellant's threats and animosity was relevant, and it also provided context for other testimony about remarks appellant made to co-workers about his neighbors and ex-girlfriend. The court also observed that evidence of appellant's acrimonious and emotional separation from Worthy was potentially exculpatory because it showed that appellant was prone to hyperbole, and it suggested that appellant's hostile behavior during the relevant time period may not have been directed specifically at Jesse Simpson.

Appellant contends the trial court committed prejudicial error because the text messages were wholly irrelevant, highly inflammatory and should have been excluded under section 352. "We will only disturb the trial court's exercise of discretion under Evidence Code section 352 'when the prejudicial effect of the evidence clearly outweighed its probative value.' [Citation.] A trial court abuses its discretion when its ruling 'falls outside the bounds of reason.' " (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) Here, the text messages were relevant to corroborate Worthy's testimony that appellant accused her of committing various misdeeds with Jesse and Thomas Simpson. Testimony about this subject was central to the prosecutor's theory regarding appellant's motive for the charged murder. Moreover, the trial court's determination that evidence of appellant's habit of using intemperate language would assist the jury in evaluating testimony about other threats appellant allegedly made was not outside the bounds of reason. Thus, we conclude that admitting this evidence was not an abuse of discretion.

c. Reddy Impeachment Evidence

The trial court granted the prosecutor's pre-trial motion to exclude evidence that David Reddy suffered a 1972 conviction for felony sale of marijuana on the ground that the conviction was too remote to be probative of Reddy's credibility. Appellant contends this evidence was admissible because it was probative of Reddy's dishonesty and

excluding it was prejudicial because if the jury had known Reddy was a convicted felon it likely would have disregarded his damaging testimony that appellant went looking for Jesse with a baseball bat.

“A witness may be impeached with any prior conduct involving moral turpitude whether or not it resulted in a felony conviction, subject to the trial court’s exercise of discretion under Evidence Code section 352. [Citations.]” (*People v. Clark* (2011) 52 Cal.4th 856, 931.) When deciding whether to admit a prior conviction for impeachment, pertinent considerations include whether the conduct reflects on the witness’s honesty and whether it is near or remote in time. (*Ibid.*) “Because the court’s discretion to admit or exclude impeachment evidence ‘is as broad as necessary to deal with the great variety of factual situations in which the issue arises’ [citation], a reviewing court ordinarily will uphold the trial court’s exercise of discretion [Citations].” (*Id.* at p. 932.) Applying these rules, we find no abuse of discretion here. Reddy’s conviction for selling marijuana more than 40 years prior to appellant’s trial did not have a direct bearing on his honesty and it was extremely remote.

2. Procedural Matters

a. Spectator Misconduct

On the 29th day of appellant’s trial, there was a brief interaction with court spectators, which appellant now characterizes as prejudicial misconduct. When the afternoon session began, the jury was asked to step out while the court and counsel participated in an unreported conference. Then defense counsel made a record of his objection to the fact that two individuals had come into the courtroom wearing shirts with “large pictures” of Jesse Simpson on them. Counsel argued that the conduct was intended to “prejudice the jury in some form or another,” and requested that the spectators be excluded, and the jury be admonished.

The court identified the two spectators sitting near the back of the courtroom and asked them to stand. The court observed that these individuals, one male and the other female, had been in court “many, many times,” and that they obviously loved Jesse Simpson. However, the court explained that the law did not permit them to wear placards

or buttons and admonished them to remove the shirts. Both spectators stated that they understood what the court was saying and one of them apologized. Then the jury was called back to the courtroom and admonished that the t-shirts were not evidence, had nothing to do with the evidence in this case, and should not influence the jury in any way or be considered by them “in any fashion whatsoever.”

Appellant contends that the t-shirt display was so prejudicial that it would be sophistry to believe that the jury followed the court’s admonition to disregard it. We disagree. The record shows that the incident was brief, the spectators were respectful to the court, and the court gave a thorough admonition, just as the defense requested.

Appellant argues that other circumstances in the record indicate the t-shirt incident was more prejudicial than it appears. He points out that early in the trial, when the court made an observation outside the presence of the jury that there were so many spectators, defense counsel opined that these individuals were partisan and should be admonished. The court stated that it would watch the situation and consider the matter further. Then several days later, defense counsel raised the matter again outside the presence of the jury by objecting that spectators were giving him and appellant dirty looks. The court and prosecutor both stated they had not noticed this. Nevertheless, before the jury returned, the court admonished the audience to be respectful.

These events reinforce our conclusion that the t-shirt incident did not result in prejudice to appellant by demonstrating that the court was cognizant that many people were interested in this trial because of their connection to the victim and took steps to ensure they would not interfere with the judicial process. There is no evidence that the individuals who wore the t-shirts intended to be disruptive. Moreover, it appears that they were respectful of the court and complied immediately with the admonition.

Finally, appellant highlights an incident that occurred during defense counsel’s closing argument. When counsel argued that the fact that Jesse’s family did not testify was an indication that appellant’s testimony was truthful, a spectator stated, “It’s a lie.” Defense counsel did not object to the outburst or request an admonition. The “ ‘failure to object to and request a curative admonition for alleged spectator misconduct waives the

issue for appeal if the objection and admonition would have cured the misconduct.’ ” (*People v. Chatman* (2006) 38 Cal.4th 344, 368.) In any event, a single trivial remark of this nature is generally viewed as non-prejudicial absent some indication that it would affect the verdict, which we do not find here. (See e.g. *People v. Trinh* (2014) 59 Cal.4th 216, 250–251.)

b. Juror Misconduct

Appellant contends there were two separate incidents of juror misconduct, which deprived him of a fair trial.

“ ‘[W]here a verdict is attacked for juror taint, the focus is on whether there is any overt event or circumstance . . . which suggests a likelihood that one or more members of the jury were influenced by improper bias.’ [Citation.] . . . Jury misconduct ‘raises a rebuttable “presumption” of prejudice.’ ” (*People v. Tafoya* (2007) 42 Cal.4th 147, 192 (*Tafoya*), italics omitted.) “We assess prejudice by a review of the entire record. ‘The verdict will be set aside only if there appears a substantial likelihood of juror bias.’ ” (*Id.* at pp. 192–193.)

In this case, a juror was removed for misconduct during the evidence phase of trial. The incident was reported to the court by an alternate juror who heard the sitting juror say: “ ‘When do we get to deliberate? . . . I have already heard enough to know he’s guilty. . . . Just kidding.’ ” According to the alternate, the juror spoke in a “bragging way,” and also said that he had played a “pivotal” role when he was a juror in a prior trial. The juror was questioned and denied making these statements but was nevertheless dismissed and replaced with an alternate. The other jurors were questioned, and all reported that they did not hear the juror make inappropriate comments.

On appeal, there is no dispute that the removed juror committed misconduct. “This misconduct gives rise to a presumption of prejudice, which ‘may be rebutted . . . by a reviewing court’s determination, upon examining the entire record, that there is no substantial likelihood that the complaining party suffered actual harm.’ ” (*People v. Leonard* (2007) 40 Cal.4th 1370, 1425.) We reach that conclusion here based on

evidence that the trial court questioned the jury about the incident and admonished them to ensure that they were not influenced by the misconduct.

Appellant contends there was a second incident of misconduct during jury deliberations. He raised this issue in a motion for new trial, contending that some jurors reported that another juror who was a doctor stated that he agreed with the prosecution expert who conducted Jesse Simpson's autopsy "that the effect of the trauma would make it unlikely that the victim would be able to walk and/or talk given the loss of muscle control, and immediate brain injury." In this court, appellant renews his argument that this juror committed misconduct by presenting "extra-judicial expert medical evidence to his fellow jurors while deliberating."

"A juror who 'consciously receives outside information . . . or shares improper information with other jurors' commits misconduct." (*Tafoya, supra*, 42 Cal.4th at p. 192.) However, " "[i]t is not improper for a juror, regardless of his or her educational or employment background, to express an opinion on a technical subject, so long as the opinion is based on the evidence at trial. Jurors' views of the evidence, moreover, are necessarily informed by their life experiences, including their education and professional work." ' ' ' ' (*People v. San Nicolas* (2004) 34 Cal.4th 614, 649.) Here, there is no evidence that the juror in question considered extraneous information. Instead, he expressed an opinion about the trial evidence, which was proper. Thus, we reject appellant's theory that juror misconduct occurred during deliberations.

3. Prejudice

Appellant contends the aggregate prejudicial effect of the five alleged errors addressed above was greater than the sum of the prejudice of each error standing alone. (Citing *People v. Hill* (1998) 17 Cal.4th 800, 845.)

"In examining a claim of cumulative error, the critical question is whether defendant received due process and a fair trial. [Citation.] A predicate to a claim of cumulative error is a finding of error. There can be no cumulative error if the challenged rulings were not erroneous." (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1068; see also *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [finding that to the extent any

errors occurred, they were minor and “[e]ven considered collectively” they did not result in prejudice].)

In the present case, the three evidentiary rulings challenged by appellant were not errors. Moreover, the two procedural errors were minor, and the court took steps to ensure they had no prejudicial impact on the jury. Whether these errors are considered separately or cumulatively does not alter our conclusion that they did not result in prejudice.

D. Sentencing Issue

After this case was fully briefed, we granted appellant’s request for supplemental briefing to address whether a remand is required to determine whether appellant has the ability to pay the following fees and fines imposed at his sentencing hearing: (1) a \$30 conviction assessment imposed under Government Code section 70373; (2) a \$40 court security fee imposed under section 1465.8; (3) a \$10,000 restitution fine imposed under section 1202.4, subdivision (b)–(d); (4) a \$10,000 parole revocation restitution fine imposed under section 1202.45, subdivision (a); and (5) direct victim restitution in the amount of \$975, imposed under section 1202.4, subdivision (f).

Appellant argues that the trial court erred by imposing these fees and fines on him without finding that he has the ability to pay them. As support for this claim, appellant relies on the recently published decision in *People v. Duenas* (2019) 30 Cal.App.5th 1157 (*Duenas*), which holds that imposing fines and fees on a defendant who lacks the ability to pay them violates constitutional due process.

Appellant forfeited this claim because he did not object that he lacked the ability to pay any fine or fee that was imposed on him. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 [appellate forfeiture rule applies to probation fines and attorney fees imposed at sentencing]; *People v. McCullough* (2013) 56 Cal.4th 589, 596–598 [defendant forfeits appellate challenge to the sufficiency of evidence supporting a Government Code section 29550.2, subdivision (a) booking fee if objection not made in the trial court]; *People v. Avila* (2009) 46 Cal.4th 680, 729 [appellant forfeiture rule applies to defendant’s claim that restitution fine amounted to an unauthorized sentence

based on his inability to pay]; *People v. Nelson* (2011) 51 Cal.4th 198, 227 [claim that trial court erroneously failed to consider ability to pay a restitution fine forfeited by the failure to object].)

Appellant argues his failure to object did not forfeit his challenge to these fines and fees because an objection would have been futile. He reasons that at the time his sentencing hearing was conducted no court had questioned the constitutionality of mandatory statutory fines and fees that are routinely imposed on criminal defendants, but now that *Duenas* has been decided he is entitled to the benefit of that decision. We are not persuaded by this argument, which overlooks material distinctions between *Duenas* and this case.

The *Duenas* defendant was convicted of driving on a suspended license and sentenced to probation. (*Duenas, supra*, 30 Cal.App.5th 1157.) At her sentencing hearing she objected that she did not have the ability to pay statutory fees and fines, requested a hearing on the matter and produced undisputed evidence establishing her inability to pay. (*Id.* at p. 1162.) Consequently, the court struck some fees, but imposed others that it concluded were mandatory. (*Id.* at pp. 1162–1163.) On appeal, the *Duenas* court found it was a violation of constitutional due process to impose court assessments required by section 1465.8 and Government Code section 70373, neither of which was intended to be punitive, without finding that the defendant had the ability to pay them. (*Id.* at p. 1168.) The court also found that, although a restitution fine imposed under section 1202.4 was considered additional punishment for defendant’s crime, that fine posed constitutional concerns because the trial court was precluded from considering ability to pay when imposing the minimum fine authorized by the statute. To avoid the constitutional problem, the court held that section 1202.4 requires a trial court to impose a minimum fine regardless of ability to pay, but that execution of the fine must be stayed until the defendant’s ability to pay is determined. (*Id.* at p. 1172–1173.)

In the present case, appellant was ordered to pay some of the mandatory fees and fines that were discussed in *Duenas* and others that were not. Unlike the *Duenas* defendant, appellant did not object to his fees and fines on *any* factual or legal ground.

He never argued that he lacked the ability to pay them or that they were improper for any other reason. Moreover, in contrast to *Duenas*, in this case appellant's ability to pay was a statutory consideration with respect to the two most significant fines, the \$10,000 restitution fines imposed under sections 1202.4 and 1202.45 respectively.

As appellant points out, section 1202.4, subdivision (c) provides that a defendant's inability to pay does not constitute a compelling and extraordinary reason for not imposing the restitution fine provided for by this statute. However, he overlooks that section 1202.4, subdivision (d) outlines factors for the court to consider when setting the amount of a restitution fine above the statutory minimum, which includes the defendant's "inability to pay." Here, the probation department recommended that the court impose the maximum statutory fine of \$10,000, a recommendation that the trial court adopted without objection. Had appellant believed that the trial court failed to give adequate consideration to his ability to pay restitution, it was incumbent on him to raise this objection at the sentencing hearing, and his failure to do so resulted in a forfeiture of the claim for purposes of appellate review. (*People v. Nelson, supra*, 51 Cal.4th at p. 227.)⁴

Appellant argues in the alternative that if his claim was forfeited, he was denied his right to the effective assistance of counsel. This rote argument is inadequate to carry appellant's heavy burden of overcoming the presumption that he was provided with effective assistance. (See *People v. Lucas* (1995) 12 Cal.4th 415, 436–437.) Appellant posits that defense counsel should have anticipated a case like *Duenas*, and his failure to object to the fees and fines fell below objective standards of reasonableness, which is not a convincing supposition. The real question is whether the defense should have objected that appellant lacked the ability to pay these fines. The trial evidence regarding appellant's potentially lucrative side-business selling marijuana suggests that defense counsel may well have had a tactical reason for deciding not to make that objection.

⁴ The parole revocation restitution fine was imposed under section 1202.45, subdivision (a), which provides for a fine of the same amount as the restitution fine under section 1202.4. Thus, ability to pay was a statutory consideration as to this fine as well.

IV. DISPOSITION

The judgment is affirmed.

TUCHER, J.

WE CONCUR:

POLLAK, P. J.

STREETER, J.

People v. Lively (A154039)